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71-521

No.____

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In The Supreme Court of The United States

OCTOBER TERM, 1971

DESERT OUTDOOR ADVERTISING, INC.; SEYMOUR BUXBOM and CAROL BUXBOM,

Petitioners,

-vs-

COUNTY OF RIVERSIDE, a political subdivision of the State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, entered May 18, 1971.

OPINION BELOW

The opinion by the Court of Appeal, certified for non-publication appears in Appendix A.

JURISDICTION

The decision of the Superior Court of Riverside County, California denying injunctive relief was entered April 9, 1970. Said decision was affirmed on appeal by the Court of Appeal of California, Fourth Appellate District, Division Two on May 18, 1971, and a Petition for Rehearing by said Court of Appeal was denied on June 7, 1971. A Petition for Hearing to the Supreme Court of California was denied on July 14, 1971, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

WHETHER IT IS A DENIAL OF EQUAL PROTECTION OF THE LAW FOR A COUNTY TO DISCRIMINATINGLY ENFORCE A ZONING ORDINANCE (A) BY STIPULATING TO INJUNCTIVE RELIEF WITH TWO MAJOR OUTDOOR ADVERTISING COMPANIES AND AT THE SAME TIME REFUSING THE SAME INJUNCTIVE RELIEF TO PETITIONERS, AS COMPETITORS, AND (B) BY BRINGING REPEATED CRIMINAL ACTIONS AND THREATS UNDER THE ZONING ORDINANCE AGAINST PETITIONERS AND PERSONS DOING BUSINESS WITH PETITIONERS WHILE FAILING TO SIMILARLY ENFORCE THE ORDINANCE AGAINST SAID COMPETITORS.

CONSTITUTIONAL PROVISIONS INVOLVED

The "equal protection" clause of the 14th Amendment to the Constitution of the United States is directly involved and invoked by petitioners:

> ". . . No State shall . . . deny any person within its jurisdiction the equal protection of the laws."
> U. S. Constitutional, 14th Amendment, Section 1

STATEMENT OF THE CASE

Petitioner DESERT OUTDOOR ADVERTISING, INC. owns advertising signboards in six southern California counties, including 82 signboards located within the M-3 Zone of Riverside County, which signboards were in existence prior to September 22, 1960. Petitioners SEYMOUR BUXBOM and CAROL BUXBOM are stockholders and have been officers of said corporation. On September 22, 1960, respondent RIVERSIDE COUNTY amended zoning ordinance No. 348 to prohibit off-site signboards within its M-3 Zone. Said amendment provided that signboards already in existence as of its effective date could remain as pre-existing uses for a period of five years.

Upon expiration of the five-year period, three separate criminal actions were prosecuted against petitioners. Petitioner SEYMOUR BUXBOM was found guilty of violating the ordinance by a judgment entered September 8, 1967 and petitioner DESERT OUTDOOR ADVERTISING, INC. was convicted of a similar violation on April 20, 1970. In addition, letters and

notices have been sent and are being sent to landowners upon whose land petitioners' signboards are located, threatening them with criminal action if the signboards are not removed.

Commencing in July, 1966, petitioners brought various legal actions for injunctive relief against enforcement of the ordinance, which actions were ultimately dismissed by petitioners. Meanwhile, on April 21, 1967, petitioners' main business competitors, Ryan Outdoor Advertising, Inc. (Referred to as Ryan herein) and United Advertising Co. (Referred to as United) filed a legal action in Riverside County alleging that the ordinance is illegal, invalid and unconstitutional. Ryan and United requested preliminary injunctive relief as to all of their signboards in existence as of September 22, 1960, on the grounds that the ordinance constituted a taking of those signboards without compensation. On May 26, 1967 respondent COUNTY OF RIVERSIDE through its County Counsel entered into a stipulated injunction with Ryan and United restraining the County from enforcing the ordinance as to all signboards which were in existence as of September 22, 1960. Ryan and United attached a list of signboards to the stipulated order, showing eleven signboards admittedly "erected subsequent to September, 1960." In addition to the eleven signboards listed, Ryan and United own at least nine other signboards in the M-3 Zone which were erected after September 1960. The Ryan and United injunction is now in full force and effect.

Petitioners then commenced this present legal action on January 9, 1968, alleging the exact same allegations as those contained in the Ryan and United action. Petitioners also requested preliminary injunctive relief as to their signboards in existence prior

to September 22, 1960, and asked for the same injunction as that afforded to Ryan and United. Respondent County refused to agree to such injunctive relief, and vigorously opposed petitioners' applications to the court for such preliminary injunction. In addition, respondent COUNTY interposed five consecutive demurrers and an appeal on a venue issue, which procedural steps were not finalized until April 9, 1970 when the court overruled the demurrers and ordered respondent to answer. In the meantime, on July 18, 1969 the trial court did enter a temporary restraining order prohibiting respondent from physically tearing down the signboards, as threatened, until a hearing as to petitioners' application for preliminary injunction. The Superior Court of Riverside County finally denied petitioners' application for injunction on April 9, 1970, without opinion of any kind. Petitioners' appealed to the Court of Appeal of California, Fourth Appellate District, Division Two, which appeal was denied and request for rehearing denied. Upon denial of a petition for hearing to the California Supreme Court, this petition for certiorari is now presented.

The present situation, therefore, is that petitioners have been denied preliminary injunctive relief and are faced with imminent danger of their 82 signboards being physically destroyed by respondent as respondent has threatened. In addition, petitioners and their landowners are being repeatedly brought to trial for criminal violation of the ordinance. At the same time, petitioners' competitors, Ryan and United, have been granted immunity to prosecution by a stipulated injunction. To compound the inequality, respondent COUNTY has taken no steps whatever to enforce the ordinance even as against those signboards of Ryan and United which are admittedly not covered by the stipulated injunction.

HOW FEDERAL QUESTIONS ARE PRESENTED

Petitioners have presented the specific ground of lack of "equal protection" at every stage of the proceeding as a basis for the granting of the injunctive relief which they seek. The issue was presented to the trial court by motion and points and authorities citing the same authorities as cited herein, infra, in the Reasons for Granting the Writ. The issue was stated and argued as a separate "Issue on Appeal" in petitioners' opening brief, and as a basic issue in the Petition for Rehearing before the Court of Appeal. This same issue was presented as one of the three "Issues on Appeal" in the petition for hearing to the California Supreme Court.

REASONS FOR GRANTING THE WRIT

This Supreme Court has consistently held that the 14th Amendment prohibits intentional discriminatory enforcement of a criminal statute. The cases of Yick Wo vs. Hopkins, 118 U.S. 356; Williams vs. Mississippi, 170 U.S. 213; Ah Sin vs. Wittman, 198 U.S. 500; and Norris vs. Alabama, 294 U.S. 587 are all landmark cases prohibiting the unequal enforcement of a statute that may on its face be fair and impartial.

Yet petitioners are being denied equal protection of the laws in a flagrant manner, with disasterous results to petitioners' entire business. The County of Riverside is acting with an unequal eye and an uneven hand in enforcing its zoning ordinance with vigor against petitioners, while failing to enforce the same ordinance against petitioners' competitors to the extent of granting stipulated injunctive relief against enforcement as to those competitors. To compound the inequality, the

County has even failed to take any action to enforce the ordinance against the competitors' signboards which admittedly are not covered by the stipulated injunction. Yet the trial court and the court of appeal have failed to afford to petitioners the same relief which has been given by stipulation to the competitors. The California courts have thus denied equal protection to petitioners in a manner completely contrary to the 14th Amendment itself and the decisions of this Supreme Court.

CONCLUSION

The COUNTY OF RIVERSIDE is destroying the advertising business of petitioners by vigorous and repeated criminal enforcement of its zoning ordinance against them. At the same time, the County Counsel and the Superior Court of Riverside County have stipulated to the immunity of petitioners' major competitors, Ryan and United, and have refused to enforce the ordinance even as to their signboards which are not included within their stipulation. The issue is crystal clear, the damages severe, and the constitutional demand imperative. If equal protection of the law is to be a reality, this Supreme Court is the only means to redress the injustice. For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SWING, SCHARNIKOW,
LEWIS & KROLL

By: DAVID K. KROLL

Attorneys for Petitioners

APPENDIX "A"

CERTIFIED FOR NONPUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA.

DESERT OUTDOOR ADVERTISING, INC., et al.,	)	COURT OF APPEAL- FOURTH DIST. FILED MAY 18 1971 JOHN R. McDOWELL, Clerk Deputy Clerk
Plaintiffs and Appellants,	)	
vs.	)	
COUNTY OF RIVERSIDE, et al.,	)	
Defendants and Respondents.	)	

4 CIVIL 10494

OPINION

APPEAL from an order denying a petition for a preliminary injunction and dissolving a temporary restraining order, entered in the Superior Court in and for the County of Riverside. Alexander B. Yakutis, Temporary Judge.* Affirmed.

Swing, Sharnikow, Lewis & Kroll, by David K. Kroll, for Plaintiffs and Appellants.

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* Pursuant to stipulation, see Const., art. VI, § 21.) (See, People v. Tijerina (1969) 1 Cal. 3d 41.)

Ray T. Sullivan, Jr., County Counsel of the County of Riverside, by Tilden L. Brooks, Deputy County Counsel, for Defendants and Respondents.

BY THE COURT.

On or about December 31, 1948, the Board of Supervisors of Riverside County enacted a comprehensive zoning plan, designated Ordinance 348, dividing the county into zoning districts. The effect of this ordinance was to restrict the uses to which private real property in the various zones might be put. Under the terms of the zoning plan, approximately ninety per cent of the unincorporated area in the county was placed in the M-3 zone. Among the uses permitted in the M-3 zone were outdoor advertising sings and structures, whether or not appurtenant to any other permitted use.

On September 22, 1960, the Board of Supervisors amended Ordinance 348 to read, in pertinent part:

> M-3 Zone (Regulated Industrial)
>
> All the unincorporated territory of the County which is not included under the terms of this ordinance in any other zone is hereby designated and classified as M-3 Zone.
>
> Section 3.1. Uses Permitted
>
> (a) Any use permitted in Zones M-4, A-2 and W-2 except outdoor advertising signs or structures not appurtenant to a permitted use.

ARTICLE XVIII

Section 18.6 Nonconforming Building and Uses

The following regulations shall apply to all nonconforming buildings and uses existing on the effective date of this Ordinance:

(b) A nonconforming use may be maintained for the following periods of time: . . .

3. Outdoor Advertising, five years.

Section 18.23 Outdoor Advertising

(a) "Outdoor advertising" or "outdoor advertising display" as used herein shall mean outdoor advertising or sign as defined in Section 21:56, and shall include any structure, other than the surface of an existing building, which supports the outdoor advertising upon which it is placed or maintained.

ARTICLE XXI

Section 21:56 Outdoor Advertising or Sign

Any sign other than an appurtenant or public service sign. An appurtenant sign is one relating

> only to goods sold or services rendered upon the building site upon which said sign is erected or maintained.

The ordinance further provided means by which one might obtain a variance to the zoning regulations and imposed penal sanctions for violations of the regulations.

On January 9, 1968, plaintiffs filed a complaint against defendants in the Superior Court of San Diego County. The complaint sought a declaratory judgment that Ordinance 348 was unconsitutional [sic] as applied to plaintiffs, a temporary restraining order, and preliminary injunctions barring the enforcement of the enactment. Plaintiffs alleged: that the 1960 amendment had not been properly enacted; that the area of regulation of outdoor advertising had been preempted by the state and federal governments; that the ordinance was an excessive exercise of county authority in that it failed to promote the general health, safety or welfare; that the ordinance restricted plaintiffs' freedom of speech and right to acquire property and constituted a deprivation of property without due process of law, and as applied, deprived plaintiffs of the equal protection of the law.

Defendants' motion for change of venue to Riverside County was ultimately granted by the Supreme Court. (County of Riverside v. Superior Court, 69 Cal. 2d 828.) Thereafter, the defendants filed a series of demurrers to the complaint, based on plaintiffs' failure to exhaust their administrative remedies under the ordinance and their failure to allege with particularity the nature of the interest they held in the land being rezoned. The demurrers were sustained, and plaintiffs' repeated

petitions for preliminary injunction were denied. However, the trial court granted a temporary restraining order, enjoining the defendants from enforcing the ordinance against plaintiffs. Plaintiffs ultimately amended their complaint to allege a leasehold interest in 81 pieces of land upon which outdoor billboards had been erected, and fee title to another. In regard to the exhaustion of their administrative remedies, plaintiffs amended their complaint to admit that they had not sought variances under the ordinance because they did not believe that they would qualify, because an individual variance was needed for each of their 82 billboards and because the cost of applying for 82 variances would have been excessive.

On January 29, 1970, the superior court again sustained defendants' demurrer to the complaint on the ground that plaintiffs had failed to exhaust their administrative remedies; plaintiffs were given 30 days to amend. The court further denied a renewal of plaintiffs' petition for a preliminary injunction, but the temporary restraining order theretofore issued was extended pending the amendment of the complaint.

Plaintiffs thereafter amended their complaint, but failed to allege any new material regarding the exhaustion of administrative remedies. Further, plaintiffs renewed their motion for preliminary injunction. Defendants again demurred to the complaint, on the ground that plaintiffs had failed to exhaust their administrative remedies. The demurrer and motion for preliminary injunction were heard on March 20, 1970. On April 9, the court made its ruling. Defendants' demurrer was overruled and defendants were given 30 days to answer. Plaintiffs' petition for preliminary injunction was denied, and the temporary restraining order was dissolved.

On April 13, 1970, plaintiffs filed a notice of appeal from the portions of the order denying the petition for preliminary injunction and dissolving the temporary restraining order. No further proceedings have been taken in this case since the filing of the notice of appeal.

Initially, we note that Code of Civil Procedure, § 904.1, makes appealable an order denying a petition for preliminary injunction. (See also Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526.)

Code of Civil Procedure, § 526, states that an injunction may not issue to prevent the execution of a public statute by officers of the law for the public benefit. (See also Civ. Code, § 3422, regarding permanent injunctions.) An exception has been made to this general rule in both federal and state courts where constitutional statutes are being unconstitutionally applied to suppress constitutional rights guaranteed to all citizens by either the federal or state constitutions. (Cox v. Louisiana, 379 U.S. 559; Wright v. Georgia, 373 U.S. 284; Edwards v. South Carolina, 372 U.S. 229; Brock v. Superior Court, 12 Cal. 2d 605; Buenemfan v. City of Santa Barbara, 8 Cal. 2d 405; Pitchess v. Superior Court, 2 Cal. App. 3d 644.)

In determining whether these special circumstances exist, a trial court must proceed with great caution. In City of Santa Monica v. Superior Court, 231 Cal. App. 2d 223, this standard of care is set forth as follows: ". . . we regard it as beyond question that trial courts should be extremely cautious, and even hesitant and reluctant, when asked to enjoin law enforcement officials from enforcing an ordinance obviously approved and adopted by duly elected representatives of the people for the purpose of promoting and protecting

public morality prior to a trial on the merits." [Original emphasis.]

Statutes substantially similar to Riverside County Ordinance 348 have been repeatedly upheld by this and other courts of this state. (Desert Outdoor Advertising Co. v. County of San Bernardino, 255 Cal. App. 2d 765; McMahan's Furniture Co. v. City of Pacific Grove, 219 Cal. App. 2d 732; Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270; National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375; see also National Advertising Co. v. County of Monterey, 1 Cal. 3d 875.) In view of the preexisting law on the subject of zoning ordinances regulating outdoor advertising, we conclude that the trial court was correct in exercising a high degree of caution in passing on the petition for a preliminary injunction. We find no abuse of discretion in this ruling.

Judgment affirmed.

CERTIFIED FOR NONPUBLICATION.

APPENDIX "B"

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DIVISION

DIVISION TWO

DESERT OUTDOOR ADVERTISING INC	) COURT OF APPEAL- FOURTH DIST. FILED JUN 7 - 1971 JOHN R. McDOWELL, Clerk
vs.	)
COUNTY OF RIVERSIDE, ETC	)

Deputy Clerk

4 Civ No. 10494

BY THE COURT:

The petition by appellants for a Rehearing is DENIED.

Dated June 7, 1971

Gardner, P.J. P.J.

Copies to:
County Clerk, Riverside, 92501
County Counsel, Riverside, 92501
David K. Kroll, 1401 U.S. National Bank Bldg., San Diego, 92101

APPENDIX "C"

CLERK'S OFFICE SUPREME COURT
4250 State Building

San Francisco, California 94102

JULY 14 1971

Dear Sir: I have this day

filed Order

HEARING DENIED

In re: 4 Civ. No. 10494

Desert Outdoor Advertising

vs.

Co. of Riverside

Respectfully

G. E. BISHEL
Clerk